(29,571)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 307.

NYANZA STEAMSHIP COMPANY, LTD., APPELLANT,

vs.

JAHNCKE DRY DOCK NO. 1, JAHNCKE DRY DOCKS, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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1 UNITED STATES OF AMERICA:

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

In Admiralty

No. 17081

CAPTION

NYANZA STEAMSHIP COMPANY, LTD.,

versus

JAHNCKE DRY DOCK NO. 1, or JAHNCKE STEEL DRY DOCK, et als.

Appearances: Richard B. Montgomery, Esq., proctor for Nyanza Steamship Company, Limited, Appellant; Messrs. Terriberry, Rice & Young, proctors for Jahncke Dry Dock No. 1, and Jahncke Dry Docks, Inc., Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana, New Orleans Division, to the Supreme Court of the United States, Returnable Within 30 Days from the 6th Day of April, 1923, at the City of Washington, D. C.

TRANSCRIPT OF RECORD

2 United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted]

LIBEL

[Filed Oct. 9, 1922]

To the Hororable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana:

The libel of the Nyanza Steamship Company Limited, a corporation created under the laws of the State of Delaware, and owners of the S. S. "Nyanza," and of W. K. Martin, Captain, on behalf of himself and the crew of said Steamship, whose names and wages will hereafter be given, against the vessel known as the "Jahncke Steel Dry Dock or the Jahncke Dry Dock No. One, the property of the Jahncke Dry Dock & Ship Repair Company, Inc., and her apparel, boats furniture and other appurtenances, now lying in the port of New Orleans, in the District aforesaid, and against the Jahncke Dry Dock & Ship Repair Company, Inc., owners, in New Orleans, Louisi-

ana, in cause of salvage and collision and damages, civil and maritime, with respect represents:

First. That the Jahncke Dry Dock & Ship Repair Company Inc. is a corporation created under the laws of the State of Louisiana, and domiciled and doing business in the City of New Orleans, said State, and within the jurisdiction of this Honorable Court, and were at all times hereinafter mentioned the owners of a movable and seagoing dry dock and with power to move itself by means of a capstan, and was at times fastened to shore solely by ropes or cables and held by anchors in river and for temporary location, and to be moved where business requirements might designate its use, and known as the Jahncke Steel Dock or Jahncke Dry Dock Number One and
3 in every way a vessel and subject to admiralty jurisdiction, now lying in the Mississippi River in the Port of New Orleans.

Second. That the libellants, the Nyanza Steamship Company, Limited, is the owner of the certain valuable Steamship "Nyanza" of the gross ton-age of 4,762 tons, engaged in the navigation of the seas and the carrying of merchandise.

Third. That on the morning of May 18, 1922, the said Jahncke Dry Dock & Ship Repair Company, Inc., undertook and engaged to dock the said SS. "Nyanza" for the purpose of repair, in said dry dock.

Fourth. That at say 6.05 a. m. morning of May 18th, the tug "Adler" arrived alongside to assist the "Nyanza" in entering the dry dock; and at 7 a. m. she cast off lines from the 7th Street wharf, New Orleans, hove up anchor and after turning assisted by the tug mentioned, proceeded down the river under various slow bells, turned again opposite the Navy Yard heading upstream, and drifted down the river, arriving off the Jahncke plant at 7.35 a. m.; that said dock was not ready for the "Nyanza" and a steamer moored on the outside of the steamer Chalmette at the lower end of the dry dock had to be moved before the "Nyanza" could enter. This made it necessary for the "Nyanza" to lay out in the river, the tug "Adler" holding her up against the current. The said steamer just mentioned having been moved out and the dock sunk, the "Nyanza" entered the dock at 9 a. m., the tug "Adler" pushing the "Nyanza" about half way into the dock; that owing to the difficulty of getting out lines because of the river current and of getting the vessel ahead into the dock, it was not until 9.25 a. m. when the vessel was about half way in, that the Dock Master announced they "had the ship" and that he did not need -he engines of ship and dismissed the tug. The ship's engines were then "rung off." Much difficulty was now experienced by the Dock in attempting to haul the ship ahead into the dock. Finally one of the dock's lines parted in the attempt.

The dock had out two hauling lines to the capstans on the
4 upper end of the dock, the usual breast lines and the ship had an eight-inch manila line from the starboard bow to the shore and similar lines, one from the port bow to the upper outside end of the dock and another from the starboard quarter to the lower inside end of the dock. With these lines out and all under heavy

strain in the attempt to heave the ship ahead against the strong current the Captain of the "Nyanza" did not think it safe to depend on the line, so sent the third officer to inform the chief engineer to get his engines ready again at once for any emergency. This was done. It was about 9.53 a. m. At 9.58 a. m. the dock started to break adrift and bear down on the steamers Chalmette and West Chetac and the other dry dock lying about 500 feet or so down stream. The eight-inch manila line of the Steamship to shore did not break, but enough turns could not be caught to hold it. However, it checked to some extent the drift of the ship and dock, bringing the ship tight against the dock. That immediately the dock started to break adrift, the Steamship was able to go full ahead and before the dock had moved a hundred feet, had it moving with the "Nyanza" towards the open river.

Fifth. That by reason of said action on the part of the Steamship "Nyanza" the said *cok* was undoubtedly saved from destruction, as it was powerless to handle itself and as there were no tugs or any other vessels around which *coulat* at the time assist the said dry dock; that drydock was carried by "Nyanza" out in stream and in a safe place and was held so until tugs could come up and take charge of the dock, which towed said dock to a place of safety; that libellant did not leave said dry dock until it was safe in the keeping of the tugs, and is entitled to fair salvage services for its work in the saving of the said dock.

Sixth. That all of said services were rendered under great pressure, were necessary, valuable and successful and were highly meritorious, and were rendered at great risk and danger to the "Nyanza," and that the value of said dry dock is upwards of a million dollars; and the services being successful are deserving of a commensurate reward by decree of this Honorable Court.

Seventh. That libellants reserve the right to hereafter *dile* a list of the crew and the wages thereof and to furnish such other particulars as may be necessary in the within suit.

Eighth. That because of the breaking loose of the said dock and the negligence of said dock in the handling of said dock and of the Steamship "Nyanza," the "Nyanza" was damaged and injured to the full extent and value of eight thousand two hundred thirty three and 85/100 dollars ($8,233.85), for this, to wit:

For repairs due to plates around stern dented, condenser head cracked, when in response to call for engines the result of the use which was successful in avoiding further damage to the steamship and the salvaging of the Dry Dock itself; and for damages to be more particularly stated, made by the Alabama Dry Dock Company	$975.00
For cost of replacing mooring lines and other equipment lost and damaged, by the Ocean Ship Chandlery Company	742.48
Vessel's lost time 5 days @ $375 per day.....	1,875.00

Coal consumed account of accident 120 tons @ $6.55 per ton	786.00
Water consumed account of accident 70 tons @ 50¢	35.00
Outward river pilotage	55.67
Bar " Polotage	111.00
Inward Pilotage returning New Orleans, Shifting, Etc.	147.00
For clearing ship	7.50
Long distance telephone calls to and from New York	28.10
Telegrams to and from New York	15.35
Cost of protest	19.00
Entering at New Orleans	5.00
Entering and clearing Mobile	10.00
Fee of consulting engineer	100.00
6 Launch hire going to and from ship and dock after accident	25.00
Auto Hire	10.00
Am. Bureau of Shipping surveyor	25.00
Pilotage in and out of Mobile	175.00
Towboat docking and undocking at Mobile	200.00
Warfage on cargo delayed at N. O. 5 days including watchmen harbor dues, etc	1,500.00
Demurrage on railroad cars account 5 days delay	500.00
Office service of Moore & McCormack Co. Inc.	200.00
Fart agency fees Mobile and New Orleans for time of detention	350.00
Insurance on vessel for 5 days	71.45
Paint for painting ship's side where rubbed off during accident 10 gallons @ $2	20.00
Salvage Association London, surveyors' fee	25.00
Telegram to consignee and shippers' account of accident	25.00
Towing to Jahncke Dry Dock	75.00
	$8,233.85

Ninth. That all of said damages were occasioned by the breaking loose of said dry dock and through the fault of said dry dock, and that all of said repairs were made and all of said charges were at lowest price obtainable, and that all of said amounts are due and owing by said dry dock and the owners thereof.

Tenth. That libellants reserve the right to hereafter file herein a more detailed and full statement of the damages and the expenses hereinabove mentioned.

Eleventh. That libellants have a maritime lien and privilege against said vessel the Jahncke Steel Dry Dock or the Jahncke Dry Dock No. One for said above stated salvage and for the above stated damages, and also a claim in personam against the owners of said dock, the Jahncke Dry Dock & Ship Repair Company Inc.

Twelfth. That all and singular the premises are true and within the jurisdiction of the United States and of this Honorable Court.

7 Wherefore, libellants pray that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said vessel, her apparel, boats, furniture and other appurtenances, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters aforesaid, and that admiralty process of monition in due form of law and according to the practice of this Honorable Court issue directed to the Jahncke Dry Dock and Ship Repair Company, Inc., citing it to answer hereto, and that this Honorable Court would be pleased to decree to the libellants the payment of the said just and proper salvage demand and award of the libellants aforesaid, with cost and that the said vessel may be condemned and sold to pay the same, and that the libellants may have such other and further relief as in law and justice they may be entitled to receive.

Nyanza Steam Ship Co., Ltd. (Signed) Richard B. Montgomery, Proctor. (Signed) Richard B. Montgomery, Proctors.

8 UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Richard B. Montgomery, being duly sworn, says, that he is the Proctor for above named libellant, that it has no other officer or agent within this State other than affiant authorized to make this affidavit; that he is specially instructed by the libellants as to the truth of the matters stated in the foregoing libel; that deponent has read the matters therein and knows the contents thereof, and that the matters therein stated are true to the best of this knowledge, information and belief.

(Signed) Richard B. Montgomery, Proctor.

Subscribed and sworn to before me, this 10th day of October, 1922.
(Signed) J. C. McGee, Not. Pub. (Seal.)

ORDER

Let admiralty process issue as prayed for.
New Orleans, La., Oct. 10, 1922.

(Signed) H. J. Carter, Clerk, by E. Wendling, Deputy Clerk U. S. District Court, Eastern District of Louisiana.

9 United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted]

CLAIM

[Filed Oct. 30, 1922]

Claim

Now comes Ernest Lee Jahncke, who says that he is President of Jahncke Dry Docks, Inc., a corporation created and existing under the laws of the State of Louisiana, and domiciled in the City of New Orleans, said State; that said Jahncke Dry Docks, Inc., is the sole owner of the Jahncke Dry Dock No. 1, seized herein, and that appearer, as President of said corporation, now claims the said Jahncke Dry Dock No. 1, and prays for the restitution of the same to said corporation upon its furnishing bond, conditioned as required by law.

(Signed) Ernest Lee Jahncke. Terriberry, Rice & Young, Proctors for Jahncke Dry Docks, Inc.

Sworn to and subscribed before me this 30th day of October, 1922.

(Signed) Walter Carroll, Notary Public. (Seal.)

10 United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted]

SUPPLEMENTAL AND AMENDED LIBEL

[Filed Nov. 2, 1922.]

To the Honorable Rufus E. Foster, Judge of the United States District Court for the Eastern District of Louisiana:

The supplemental and amended libel of the Nyanza Steamship Company, Limited, libellant herein, with respect represents:

First. That it re-iterates all and singular the allegations of the original libel.

Second. That after the matters alleged in the libel occur-ed the Jahncke Dry Dock & Ship Repair Company, Inc., was succeeded by the Jahncke Dry Docks, Inc., which last corporation is responsible as alleged in original libel in place of and for the said Jahncke Dry Dock & Ship Repair Company, Inc., and should be made a party hereto.

Third. That in the prayer of the original libel the words "and said damages" were omitted after the word "award" and the words

"and interest" omitted after the word "costs"; that this was a purely clerical error and that libellant desires to amend the prayer of the libel in this particular.

Wherefore, libellant prays leave to file this supplemental and amended libel, and that the Jahncke Dry Docks, Inc., be made party hereto in place of and as successor to the Jahncke Dry Dock & Ship Repair Company, Inc., and that a copy of this supplemental and amended libel be served on and admiralty-process of monition in due form of law and according to the practice of this Honorable Court issue directed to the Jahncke Dry Docks, Inc., successor to the Jahncke Dry Dock & Ship Repair Company, Inc., claimant and defendant, citing it to answer hereto, and that judgment be rendered in accordance with said original prayer, decreeing to the
11 libellant the payment of the amount due to libellant as salvage and said damages, with costs and interest from judicial demand, and that said vessel may be condemned and sold to pay the same and that libellant may have such other and further relief as in law and justice it may be entitled to receive.

Nyanza Steamship Co., Ltd., By (Signed) Richard B. Montgomery, Proctor.
(Signed) Richard B. Montgomery, Proctor. Oct. 31, 1922.

Service acknowledged and monition waived.
(Signed) Terriberry, Rice & Young, Proctors for Jahncke Dry Docks, Inc.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

Richard B. Montgomery, being duly sworn, says, that he is the Proctor for above named libellant, that it has no other officer or agent within this state other than affiant authorized to make this affidavit; that he is specially instructed by the libellants as to the truth of the matters stated in the foregoing supplemental and amended libel; that deponent has read the matters herein and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge information and belief.

(Signed) Richard B. Montgomery.

Sworn to and subscribed before me this 31st day of October, 1922.
(Signed) Fred. C. Marx, Not. Pub. (Seal.)

ORDER

Let the within supplemental and amended libel be filed as prayed for.

(Signed) H. D. Clayton, Judge. Nov. 2, 1922.

12 United States District Court, Eastern District of Louisia
New Orleans Division

[Title omitted.]

EXCEPTION TO LIBEL & SUPPLEMENTAL LIBEL

[Filed Nov. 2, 1922.]

To the Honorable Rufus E. Foster, Judge of the United States
trict Court for the Eastern District of Louisiana:

Comes Jahncke Dry Dock, Inc., claimant and respondent,
excepts to the libel and the supplemental and amended libe
Nyanza Steamship Company, Limited, in so far as the actio
either in rem or in personam for salvage, and in rem for dam
and, for grounds of exception shows:

I

That this court sitting as a Court of Admiralty is without ju
diction of such actions, and, in the alternative,

II

The dry dock itself, not being a subject of admiralty, no m
time lien could arise there against and, such being the law, the
and the supplemental and amended libel fail to state a caus
action in rem either for the salvage or for the damage.

Wherefore, exceptor prays that these exceptions be maintai
and that the libel and supplemental and amended libel, in so fa
the action is either in rem or in personam for salvage, an
13 rem for damage, be dismissed, and for all costs of Court.
(Signed) Terriberry, Rice & Young,
tors for Exceptor.

I am a member of the firm of Terriberry, Rice & Young, Pro
for the Exceptor above; I certify that, in my opinion, the foreg
exceptions are well founded in law, and that they are not interp
for delay.

(Signed) Geo. H. Terrib

14 U. S. District Court, Eastern Dist. of La., New Orleans Division

No. 17081

[Title omitted]

OPINION OF THE COURT ON EXCEPTIONS

[Filed Feb. 21, 1923]

Submitted on Exceptions

This is a libel for salvage both in rem against the Jahncke Steel Dry Dock and also in personam against the owners.

The libel in substance alleges that on May 18, 1922, the steamship, Nyanza, owned by the libellant, was entering the dock for the purpose of having repairs made, and due to the negligence of those in charge of the dock, it broke away from its moorings. That the steamship rendered services in preventing the loss of and damage to the dock, for which it is entitled to recover a salvage award. The libel also claims an item of damages of $8,233.35 for loss of tackle and repairs to the ship alleged to have been caused by the negligence of those in charge of the dock. This item must be classed as part of the salvage claimed in the nature of expenses incurred.

An exception has been filed to the libel on the ground that the suit is not cognizable in admiralty.

Since the decision in the leading case of Cope vs. Vallette Dry Dock Co. 119 U. S. 625 it has been considered settled that a dry dock can not be the subject of salvage services. The Proctor for the libellant in an interesting and instructive brief has endeavored to point out differences between the instant suit and the Vallette Dry Dock case and cites various cases in which the Courts have taken the jurisdiction of collisions between fixed structures intended to facilitate commerce on water and also over wharf boats, dredges, rafts and scows.

15 None of the cases cited can be considered as in the least differentiating or throwing doubt upon the doctrine enunciated in the Vallette Dry Dock case. In that case the Supreme Court did not decline jurisdiction on the ground that the dock was permanently attached to the land, or that it was used to facilitate commerce on land, but rested its decision on the ground that a floating dry dock is not a vessel and that only ships and vessels and their cargoes can be the subject of salvage services.

Libellant contends however that in any event the exception should be referred to the merits and proof taken in order that the Court may be informed as to the character of the Jahncke Dry Dock. At this day the character[illegible]es of dry docks intended for the repairs of vessels are so well [illegible]n that the Court may well take notice that there is no appreci[illegible]istinction between the dock in this case and

the Vallette Dock, but in any event it is sufficiently clear from the allegations of the libel that the dock is a floating structure, moored in the harbor of New Orleans, and intended for the raising of vessels to facilitate their repairs. It would be useless to put the respondent to the trouble and expense of a defense on the merits of the case.

The exception to the jurisdiction will be sustained. The libel will be dismissed without prejudice.

(Signed) Rufus E. Foster, Judge. Feb. 21/23.

16 United States District Court, Eastern District of Louisiana, New Orleans Division

In Admiralty

No. 17081

[Title omitted]

MOTION FOR REHEARING

[Filed Feb. 23, 1923]

Motion for Rehearing

Now into Court comes the Nyanza Steamship Company, Ltd. libellant herein, and moves that a re-hearing of the exceptions filed by claimant and respondent to the jurisdiction of this Honorable Court be granted on the ground:

First. That the Supreme Court of the United States in the suit of Cope vs. Vallette Dry Dock Company, 119 U. S. 625, has not decided that a vessel or boat or structure called a "dry dock" is because of what it is called not within the jurisdiction of the admiralty court, but that the question of whether or not this kind of structure comes within the admiralty jurisdiction depends and must depend on the facts of the case as shown by the evidence, and that the judgment of this Honorable Court is incorrect, because the Court has not before it sufficient evidence or facts to show that the structure called the "Jahncke Dry Dock" in question is not such a floating structure and is not in such use as would subject it to the admiralty jurisdiction.

Second. That the judgment rendered by this Honorable Court is contrary to the law in holding that the Jahncke Dry Dock is from general knowledge such a structure as would not be subject to the admiralty jurisdiction, especially as it is not knowledge which the higher courts could be considered to have.

17 Third. That the judgment of the Honorable Court is contrary to the law in holding that the boat or vessel libeled in this case is not within the admiralty jurisdiction of this Honorable Court.

Fourth. That the judgment of this Court is contrary to the law and the evidence in holding that the claim for damages is a part of the salvage claim and dismissing libel as to it.

Fifth. That said damages having been caused by reason of the failure of the dock to carry out its contract to dock and repair the ship, and having preceded the salvage, and this cause being triable there could be no hardship on the respondent to take the testimony both on question of damages and on the question of salvage at the same time, and therefore, no hardship in setting aside the exception as to jurisdiction for the purpose of having the facts covering the dry dock before the Court.

Wherefore, it is ordered by this Hororable Court that claimant and respondent show cause on the 10 day of March, 1923, why a re-hearing should not be granted on the exception filed herein.

—— ——, Judge. (Signed) Richard B. Montgomery, Proctor. Feb. 23/23.

Service accepted—All rights Reserved.

(Signed) Terriberry, Rice & Young.

18 United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted]

DECREE

[Filed Mar. 31, 1923]

Decree

This cause came on to be heard on the exceptions to the jurisdiction of the Court.

Present: R. B. Montgomery, Esq., Proctor for Libelant; Terriberry, Rice & Young, Proctors for Exceptor.

When, after hearing argument of counsel, and the Court being of opinion that the law is in favor of exceptor:

It is ordered, adjudged and decreed that the exception to the jurisdiction be maintained, and accordingly that in so far as the action is either in rem or in personam for salvage, and in rem for damage, the same be, and it is hereby dismissed, at libelant's costs.

(Signed) Rufus E. Foster, Judge. Mar. 31/23.

19 United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted]

PETITION FOR APPEAL

[Filed Apr. 6, 1923]

Petition and Order of Appeal

To the Honorable Rufus E. Foster, Judge of the District Court of the United States for the Eastern District of Louisiana:

The petition of the Nyanza Steamship Company, Limited, libellant herein, with respect represents:

That your petitioner herein is aggrieved by the final decree against it, rendered and signed herein on the 31st day of March 1923, maintaining the exception of claimant and respondent to the jurisdiction of this Court and dismissing the libel herein insofar as the action is in rem or in personam for salvage and in rem for damage; that petitioner is informed and believes and so alleges that there is error therein to its prejudice, and petitioner desires to appeal therefrom with stay of execution, to the Supreme Court of the United States, upon giving bond in such sum as this Honorable Court may require, conditioned according to law.

Wherefore, the premisses and annexed assignment of errors considered, petitioner prays that it be granted an appeal from said final decree, to operate as a supersedeas to the Supreme Court of United States, upon its giving bond in such sum as the Court may require, conditioned according to law.

Petitioner also prays that the claimant and respondent, Jahncke Dry Docks, Inc., and all, if any other appearers there be, be duly cited to answer this appeal and that petitioner may have all such orders and relief as may be just and lawful and the Court competent to grant.

(Signed) Richard B. Montgomery, Proctor for Libellant.

Service accepted and Citation waived.

(Signed) Terriberry, Rice & Young, Proctors for Claimant and Respondent. 4/5/23.

20 In United States District Court.

ORDER GRANTING APPEAL

[Filed Apr. 6th, 1923]

The foregoing petition and accompanying and annexed assignment of errors considered, let the petitioner named in foregoing petition be granted an appeal to operate as a supersedeas from the

final decree rendered herein, upon furnishing bond in the sum ($100) One Hundred Dollars, with good — sufficient surety thereon, conditioned as the law requires; and let said appeal be made returnable to the Supreme Court of the United States, according to law.

New Orleans, Louisiana, April 6, 1923.

(Signed) Rufus E. Foster, Judge.

21 United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted.]

ASSIGNMENT OF ERRORS

[Filed Apr. 6th, 1923]

Assignment of Errors

And now comes the Nyanza Steamship Company, Limited libellant herein, seeking and asking for an appeal from the final decree rendered herein, and says that in the final decree rendered herein there is manifest error in the following, among other particulars:

First. That the Court erred in maintaining the exception that the United States District Court for the Eastern District of Louisiana is without jurisdiction of the action in rem or in personam for salvage and in rem for damage, as set forth and shown in the libel herein.

Second. That the Court erred in finding that it did not have jurisdiction of a libel in personam and in rem for salvage in the case of a movable and sea-going dry dock and with power to move itself by means of capstans; at times fastened to shore solely by ropes or cables and held by anchors in the Mississippi River, a navigable stream; and for temporary location and to be moved where business requirements might designate its use; and alleged to be in every way a vessel and subject to the admiralty jurisdiction; and of such a nature as in its use to work itself out into the river to admit ships to enter and to raise and sink itself and to get loose and float down the river, to the serious danger of destroying itself and other shipping in the harbor, and to be rescued and salved solely and alone by use of tug boats or other craft, and located in navigable waters and solely an aid to navigation.

Third. That the Court erred in finding that it did not have jurisdiction of libel in rem for damages to a ship injured in the attempt of said dock above described to dock said ship.

22 Fourth. That the Court erred in holding that it had no jurisdiction of the libel and supplemental libels filed herein insofar as the action is either in rem or in personam for salvage and in rem for damage and dismissing the libel and the actions herein to extent stated at libellant's cost.

Fifth. That the Court erred in not rendering a decree in favor of libellant and against the claimant and respondent on the exception filed herein.

Wherefore, the appellant prays that for the aforesaid errors found in said decree the same may be reversed and such decree rendered herein as ought to have been rendered in the District Court.

(Signed) Richard B. Montgomery, Proctor for Libellant and Appellant.

23 United States District Court, Eastern District of Louisiana, New Orleans Division

[Title omitted.]

CERTIFICATE AS TO JURISDICTIONAL QUESTION

[Filed Apr. 6th, 1923]

The libel in this suit is in rem and in personam for salvage and in rem for damage against the Jahncke Dry Dock Number One or Jahncke Steel Dry Dock.

Exception is filed herein by the claimant and respondent of said dock, setting forth that the dock is not a subject of admiralty jurisdiction and the action in rem or in personam for salvage and in rem for damage is not within the jurisdiction of this United States District Court for the Eastern District of Louisiana. The decree herein of March 31, 1923, maintains the exception to the jurisdiction and dismisses the libel insofar as the action is either in rem or in personam for salvage and in rem for damage. I hereby certify that in this case and in this decree the question of jurisdiction alone is in issue.

(Signed) Rufus E. Foster, Judge. April 6/23.

24 BOND ON APPEAL.

[Filed Apr. 6th, 1923.]

Know all men by these presents, That we, Nyanza Steamship Company, Limited, as principal, and Edwin R. Montgomery, as surety, are held and firmly bound unto Jahncke Dry Docks, Inc., Successors to and owners of the Jahncke Dry Dock & Ship Repair Company, Inc., in the full and just sum of one hundred dollars, to be paid to the said Jahncke Dry Docks, Inc., successors to and owners of the Jahncke Dry Dock & Ship Repair Company, Inc., certain attorney, executors, administrators or assigns: to which payment, well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of April, in the year of our Lord, one thousand nine hundred and *19*23.

Whereas, lately at a Session of the United States District Court, holding sessions in and for the Eastern District of Louisiana, in a

suit depending in said Court, between Nyanza Steamship Company, Limited versus Jahncke Dry Dock No. one or Jahncke Steel Dry Docks, et als., No. 17,081, a decree was rendered against the said Nyanza Steamship Company, Limited, and the said Nyanza Steamship Company, Limited, having obtained order of appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the said decree in the aforesaid suit, and a citation directed to the said *directed to the* Jahncke Dry Docks, Inc. (service being accepted and formal citation being waived), citing and admonishing it to be and appear before the United States Supreme Court within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Nyanza Steamship Company, Limited, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

Nyanza Steamship Company Limited, By (Signed) Richard B. Montgomery, Proctor. (Seal.) (Signed) Edwin R. Montgomery. (Seal.)

Approved by—(Signed) Rufus E. Foster, Judge.

O. K. (Signed) Terriberry, Rice & Young, Proctors for Respondent & Claimant.

24½ UNITED STATES OF AMERICA,
Eastern District of Louisiana, ss:

Personally appeared, Edwin R. Montgomery who being duly sworn, deposes and says that he is the surety on the within bond, that he resides in New Orleans, Louisiana, at 1305 Jackson Avenue, and is worth the full sum of one hundred dollars, over and above all his debts and liabilities and property exempt from execution.

(Signed) Edwin R. Montgomery.

Subscribed and Sworn before me this 6th day of April, 1923.

(Signed) J. C. McGee, Not. Pub. (Seal.)

25 United States District Court, Eastern District of Louisiana, New Orleans Division.

[Title omitted.]

PRÆCIPE FOR TRANSCRIPT.

[Filed April 6, 1923.]

The following portions of the record are to be incorporated into the transcript of the record on appeal of libellant herein, the Nyanza Steamship Company, Limited.

1. Libel.

2. Supplemental and amended libel.
4. Claim.
5. Exception of the Jahncke Dry Docks, Inc, claimant and respondent.
6. Opinion and decree, February 21, 1923.
7. Motion for re-hearing.
8. Final decree, March 31, 1923.
9. Petition for appeal and order.
10. Assignment of errors.
11. Certificate of Court certifying to the question of jurisdiction.
12. Appeal bond.
13. This præcipe for transcript of appeal.

(Signed) Richard B. Montgomery, Procter for Libellant.

Service accepted and præcipe approved, April 5, 1923.

(Signed) Terriberry, Rice & Young, Proctors for Claimant and Respondent.

26 In United States District Court.

CLERK'S CERTIFICATE.

Clerk's Office.

I, H. J. Carter, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 25 pages contain and form a full, true, complete and perfect transcript of the record, assignment of errors and all proceedings in the case entitled Nyanza Steamship Company, Ltd., versus Jahncke Dry Dock No. one or Jahncke Steel Dry Dock, et als., No. 17,081 in Admiralty of the Docket of said Court, as made in accordance with Præcipe for Transcript, copied therein.

Witness my hand and seal of said court at the City of New Orleans, La., this 12 day of April, A. D., 1923,

H. J. Carter, Clerk. [Seal of U. S. District Court for the Eastern Dist. of La., N. O. Div.]

Endorsed on cover: File No. 29,571. E. Louisiana D. C. U. S. Term No. 307. Nyanza Steamship Company, Ltd., appellant, vs. Jahncke Drydock No. 1, Jahncke Drydocks, Inc., et al. Filed April 20th, 1923. File No. 29,571.

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No. 307

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

NYANZA STEAMSHIP COMPANY, LTD.,
Appellant,

versus

JAHNCKE DRY DOCK NO. 1, JAHNCKE DRY DOCKS, INC., ET AL.,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANT.

RICHARD B. MONTGOMERY,
Proctor for Appellant.

February, 1924.

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Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLANT.

ABSTRACT OF CASE.

On the morning of May 18th, 1922, the Steamship "Nyanza", assisted by the Tug "Adler", entered the Jahncke Steel Dry Dock or the Jahncke Dry Dock No.

1, lying in the Mississippi River, the property of the Jahncke Dry Docks, Inc., previously termed the Jahncke Dry Dock and Ship Repair Co., Inc. When the "Nyanza" was about half-way in the dock, the dock itself took full charge of the "Nyanza" or "had the ship" and ordered the ship's engines "rung off," which was done. The dock then proceeded to haul the ship ahead into position by use of the dock's capstans. Because of the strong current the captain of the "Nyanza" ordered his engines ready at once for any emergency. Shortly thereafter the dock broke away from its moorings and started to drift down the river and upon the steamships lying just below. The "Nyanza" at once went full ahead on her own steam and shoving her nose against the side of the dock moved it out into the river and away from the shipping below and held her out in the stream until the tugs in the harbor could come up and take charge of the dock which was after much time, work and risk towed to a place of safety. For these services rendered, salvage services, the "Nyanza" brought an action in rem against the said dock and seized the said dock and brought an action in personam against its owners.

Because of the breaking loose of the dock, due to negligence, the said "Nyanza" was damaged and injured to the extent of some Eight Thousand Two Hundred and Thirty Three 85/100 Dollars ($8,233.85), and for this suit was brought by the owners in rem against the dock, which was seized, herein, and in personam against the owners of the said dock.

The libel alleged that the dock, which in instant case went floating down the river, was a movable and sea-going dry dock, with power to move itself by means of a capstan, and was at times fastened to shore solely by ropes or cables and held by anchors in the Mississippi River and for temporary location, and to be moved where business requirements might designate its use, and known as the Jahncke Steel Dock or Jahncke Dry Dock Number One, and in every way a vessel and subject to admiralty jurisdiction and at the time lying in the Mississippi River.

No answer was filed. No affidavits contradicted the libel. The Jahncke Dry Dock, Inc., claimant of the said dock, excepted to the libel and the supplemental and amended libel, insofar as the action was in rem or in personam for salvage and in rem for damages, on the ground that the Court sitting as the Court of Admiralty was without jurisdiction, and in the alternative, that the dry dock itself not being a subject of admiralty no maritime lien could arise there against and that the libel failed therefore to state a cause of action in rem either for salvage or for damages.

The District Court maintained the exception to the jurisdiction and dismissed the libel insofar as the action was either in rem or in personam for salvage and in rem for damage, finding as follows:

> "This is a libel for salvage both in rem against the Jahncke Steel Dry Dock and also in personam against the owners.

"The libel in substance alleges that on May 18, 1922, the steamship, Nyanza, owned by the libellant, was entering the dock for the purpose of having repairs made, and due to the negligence of those in charge of the dock, it broke away from its moorings. That the steamship rendered services in preventing the loss of and damage to the dock, for which it is entitled to recover a salvage award. The libel also claims an item of damages of $8,-233.35 for loss of tackle and repairs to the ship alleged to have been caused by the negligence and of those in charge of the dock. This item must be classed as part of the salvage claimed in the nature of expenses incurred.

"An exception has been filed to the libel on the ground that the suit is not cognizable in admiralty.

"Since the decision in the leading case of Cope vs. Vallette Dry Dock Co., 119 U. S. 625, it has been considered settled that a dry dock can not be the subject of salvage services. The Proctor for the libellant in an interesting and instructive brief has endeavored to point out differences between the instant suit and the Vallette Dry Dock case and cites various cases in which the Courts have taken the jurisdiction of collisions between fixed structures intended to facilitate commerce on water and also over wharf boats, dredges, rafts and scows.

"None of the cases cited can be considered as in the least differentiating or throwing doubt upon the doctrine enunciated in the Vallette Dry Dock case. In that case the Supreme Court did not decline jurisdiction on the ground that the dock was permanently attached to the land, or that it was

used to facilitate commerce on land, but rested its decision on the ground that a floating dry dock is not a vessel and that only ships and vessels and their cargoes can be the subject of salvage services.

"Libellant contends, however, that in any event, the exception should be referred to the merits and proof taken in order that the Court may be informed as to the character of the Jahncke Dry Dock. At this day the characteristics of dry docks intended for the repairs of vessels are so well known that the Court may well take notice that there is no appreciable distinction between the dock in this case and the Vallette Dock, but in any event it is sufficiently clear from the allegations of the libel that the dock is a floating structure, moored in the harbor of New Orleans, and intended for the raising of vessels to facilitate their repairs. It would be useless to put the respondent to the trouble and expense of a defense on the merits of the case.

"The exception to the jurisdiction will be sustained. The libel will be dismissed without prejudice."

The finding that the damages suffered by the ship was to be classed as part of salvage was reversed on rehearing; and the Court in its decree held that insofar as the action was in rem or in personam for salvage and in rem for damage, it was dismissed. From this judgment this appeal was taken.

ASSIGNMENT OF ERRORS.

The Assignment of Errors states:

First. "That the Court erred in maintaining the exception that the United States District Court for the Eastern District of Louisiana is without jurisdiction of the action in rem or in personam for salvage, and in rem for damage, as set forth and shown in the libel herein.

Second. "That the Court erred in finding that it did not have jurisdiction of a libel in personam and in rem for salvage in the case of a movable and sea-going dry dock and with power to move itself by means of capstans; at times fastened to shore solely by ropes or cable and held by anchors in the Mississippi River, a navigable stream; and for temporary location and to be moved where business requirements might designate its use; and alleged to be in every way a vessel and subject to the admiralty jurisdiction; and of such a nature as in its use to work itself out into the river to admit ships to enter and to raise and sink itself and to get loose and float down the river, to the serious danger of destroying itself and other shipping in the harbor, and to be rescued and salved solely and alone by use of tug boats or other craft, and located in navigable waters and solely an aid to navigation.

Third. "That the Court erred in finding that it did not have jurisdiction of libel in rem for damages to a ship injured in the attempt of said dock above described to dock said ship.

Fourth. "That the Court erred in holding that it had no jurisdiction of the libel and supplemental libels filed herein insofar as the action is either in rem or in personam for salvage and in rem for damage and dismissing the libel and the actions herein to extent stated at libellant's cost.

Fifth: "That the Court erred in not rendering a decree in favor of libellant and against the claimant and respondent on the exception filed herein."

ARGUMENT.

As the opinion shows the Judge found that since the decision of Cope v. Vallette Dry Dock Company, 119 U. S. 625 a "dry dock" cannot be the subject of salvage services; and that in that case the Supreme Court did not decline jurisdiction on the ground that *the dock was permanently attached to the land.* The Court in the present case did not decline jurisdiction on the ground that the dock was permanently attached to the land or that it was used to facilitate commerce on land, but rested its decision on the ground that it was *not a vessel* and that *only ships and vessels and their cargoes* could be the subject of salvage services; and then the Court found that *the characteristics* of the dry dock in *this case as known to the Court* were no different from those of the dock in the Vallette case.

My idea is that, contrary to this finding of the Court, a dry dock would come under the Vallette case solely when it was permanently attached to land and where it

was attached and used to facilitate commerce on land like a bridge or pier; but that when, as in this case, it is so constructed as to be moved over any sea and to any convenient place and is for use where conditions suggest and is anchored out in a river, and is to be used solely to "facilitate commerce on sea," such a dry dock is not covered by the Vallette case of some 40 years back and is a "vessel" and within admiralty jurisdiction.

Would not this dock be considered a vessel for salvage purposes and salvage recompense awarded if it was saved from loss while being towed from New York to New Orleans or being towed from any one of the other places where it might be towed to another place where it was to be used? Why should it lose this quality when anchored? It differs from a ship turned into a hotel or a ship turned into a dancing pavilion and anchored to land in that the dock is always to be used solely for maritime purposes or for transportation by sea.

Insofar as the question of salvage alone is concerned, while in the Vallette case the Court found that "only ships and vessels and their cargoes" could be the subject of salvage services, still they found apparently that a ship or vessel included structures *other* than an ordinary steamship or sailing vessel as shown on page 338, where was included a "hopper-barge" used for receiving mud from a dredging machine and carrying it out to deep water though it had no means of locomotion of its own but was towed by other vessels.

So the question therefore comes back to what might be considered not a technical ship but a "vessel" or, within the broader term, a "boat."

The Court in the Vallette case did find as a fact that the structure in question was a fixed structure attached to the shore and that it was, as claimed by the owners, merely pieces of lumber fastened together and placed upon the water to receive vessels for repair and with no power except to pump. This is not the structure specified in the instant case.

Setting aside the decision of the Supreme Court in Cope v. Vallette, and forgetting it for the moment and considering the following cases covering structures practically the same as the one in the instant case and no more capable of navigation and not moved as great a distance as these floating dry docks in modern time to where business may be, we respectfully suggest that the jurisdiction in the present case would be maintained.

(U. S. C. C. A., Fla., 1898): "Timber found drifting with the tide, on deep water, in a harbor, and out of control of the owners, is the subject of salvage. Whitmire v. Cobb, 88 F. 91, 31 C. C. A. 395."

(U. S. C. C., La., 1883): "In a case where a raft is adrift in a fow on the Mississippi river, in peril of loss and great damage to itself and to other property, where the person on the raft in charge called for assistance, and services of a maritime character were rendered, and the Court entertained

and maintained jurisdiction of a libel for salvage, *its decision need not be taken as holding that a raft is a vehicle of navigation,* or *can commit a maritime tort.* Tome v. Four Cribs of Lumber (1853) Fed. Cas. No. 14,083; Taney 533, distinguished. Muntz v. A Raft of Timber, 15 F. 557."

(U. S. D. C., Miss., 1881): "Salvage services can be rendered to a dismantled steamboat moored on a navigable river, and undergoing alterations and repairs for the purpose of being fitted for use *as a wharf boat.* Affirmed (C. C. 1881.) 9 F. 478. The Old Natchez, 9 F. 476."

(U. S. D. C., N. Y., 1894): "A bath house built on boats." *"Use in trade and commerce,* of the property saved, is not essential to salvage. Tebo v. City of New York (D. C.) 61 F. 692; Same v. The Public Bath, No. 13, Id."

I also quote from the Cyclopedia of Law and Procedure, Volume 35, Article on "Salvage," page 733. I appreciate that many lawyers speak slightingly of this work but it is probably more quoted than any other authority and I have never seen or heard that it was essentially wrong in its statements.

Speaking of the English rule, it says, p. 733, Vol. 35:

"A similar rule seems to be laid down in a decision of the Supreme Court of the United States; but in some American cases a broader view of the property subject to salvage is taken. Thus it has been held that the test as to what is the subject of

salvage is no longer whether it is a vessel engaged in commerce or its cargo or furniture, but *whether the thing is a movable thing, possessing the attributes of property, susceptible of being lost and saved in places within the local jurisdiction of admiralty.* There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo they clearly come under the head of wreck, flotsam, jetsam, ligan, or derelict, and salvage may be claimed upon them. But when they have no connection with a ship or vessel, some authorities are against the claim, and others in favor of it."

(Note 22, p. 734):

"For example, salvage has been awarded against a steam ferry-boat, (The Cheeseman v. Two Ferry Boats, 5 Fed Cas. No. 2,633, 2 Bond 363), a barge (Seven Coal Barges, 21 Fed. Cas. No. 12,677, 2 Biss 297), a derrick-boat (Maltby v. Steam Derrick-Boat, 16 Fed. Cas. No. 9,000, 3 Hughes 477), a canal-boat (Baker v. Hoag, 7 N. Y. 555, 59 Am. Dec. 431), a hopper-barge used for for receiving mud from a dredging-machine, although it had no means of locomotion of its own, (The Mac, 7 P. D. 126, 4 Aspin. 555, 51 L. J. Adm. 81, 46 L. T. Rep. N. S. 907), a dismantled steamboat undergoing alterations and repairs for the purpose of being fitted for use as a wharf-boat (The Old Natchez, 9 Fed. 476—affirmed in 9 Fed. 478), a sunken vessel (Baker v. Hoag, 7 N. Y. 555, 59 Am. Dec. 431), the common-law "wreck of the sea" (The John

Gilpin, 13 Fed. Cas. No. 7,345, Olcott 77), and a bath-house built on boats, and designated for navigation and transportation (Tebo v. New York, 61 Fed. 692); but not against a floating dry-dock permanently moored (Cope v. Vallette Dry-Dock Co., 119 U. S. 625, 7 S. Ct. 336, 30 L. ed. 501—affirming 10 Fed. 142 and 16 Fed. 924, 4 Woods 265; Salvor Wrecking Co. v. Sectional Dock Co., 21 Fed. Cas. No. 12,273), a vessel while in a dry-dock permanently attached to the shore for repairs (The Jefferson, 158 Fed. 358), a dismantled steamboat fitted up as a hotel (The Hendrick Hudson, 11 Fed. Cas. No. 6,355, 3 Ben. 419), or a gas float moored in a river to give light to vessels (Wells v. The Gas Float Whitton No. 2—1897—A. S. 337, 8. Aspin. 272, 66 L. J. P. D. & Adm. 99, 76 L. T. Rep. N. S. 663, 13 T. L. R. 422—affirming—1897—P. 42, 8 Aspin. 110, 65 L. J. P. D. & Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263)."

Mr. Robert M. Hughes, in his work on Admiralty Law, Second Edition, page 132, states that:

> "Salvage is paid by the Courts from motives of public policy."

and on Page 135 says:

> "It is difficult to understand why the motives of public policy on which the law of salvage is based do not apply to the rescue of any property in danger on navigable waters whether such property ever formed part of a vessel or cargo or not."

In his work one is referred to his discussion of Admiralty Jurisdiction on page 14.

I quote this at length because Mr. Hughes has long been an authority in Admiralty and because it shows the point of view of one who has both studied and practiced "Admiralty:"

> "The leading case on this subject is Cope v. Vallette Dry-Dock Co. There the Court held that the jurisdiction did not include a floating dry dock *permanently attached to the shore at New Orleans* and not intended for navigation. *It had been moored to the same place for twenty years. Had it been designed to be towed around to different places in the harbor, that would have been navigation sufficient*, and in such case the Court would probably have taken jurisdiction. It is difficult to reconcile with the case of Woodruff v. One Covered Scow, in which Judge Benedict took jurisdiction of a floating boathouse *permanently attached to a wharf to afford access* to shore for persons from small boats. (As the Vallette Dry-Dock case was only decided on January 10, 1887, and this case on February 18, 1887, it is likely that the former was not known to Judge Benedict.
>
> "Under the jurisdiction are included lighters of the simplest kind, for they are considered to "appertain to travel or trade or commerce."
>
> "A floating elevator, used for the storage of grain, *but designed to be moved from place to place* in a harbor, is included.
>
> "There are many cases extending the jurisdiction over dredges, both those which lift the mud by dippers, and deposit it in scows to be towed away, and those which work on a sucking prin-

ciple, drawing the mud from the bottom, and delivering it on shore by long lines of pipe.

"The same is true of floating movable derricks, and pile drivers."

"On the other hand, a marine pump dredge, capable of being moved from place to place, but resting on piles, and not floating, has been held to be excluded from admiralty cognizance.

"In the Public Bath No. 13 Judge Brown held that a bath house built on boats, and made to shift from place to place, is within the jurisdiction. This, and U. S. v. Burlington & Henderson County Ferry Co., are good illustrations of cases where the Courts *treat navigability irrespective* of trade or commerce as the proper test of the admiralty jurisdiction in contradistinction to the powers of Congress under the commerce clause of the Constitution.

"Judge Cushman has recently held that an aeroplane is not a subject of admiralty jurisdiction.

"In construing the meaning of the word "ship" under the English statutes conferring jurisdiction on the Admiralty Courts, the House of Lords has held that a floating gas buoy, which has been broken loose, and had been saved, could not be libeled for salvage, as it was *not designed either* for navigation or *for use in commerce*.

"The Hendrick Hudson was a dismantled steamer, which was being used as a hotel. While being towed to another place, it was in peril, and salvage services were rendered to it. The Court held

that it was not within the cognizance of the admiralty.

"*This decision would seem to be out of line with the more recent authorities.* Whether the structure was a hotel or a steamboat, it was engaged in actual navigation. Had the Vallette Dry Dock been so engaged, the Supreme Court would probably have sustained the jurisdiction."

In running through the old cases one can see what changes have come about. It has been held that:

"A canal boat having no power of self-propulsion is not subject to a lien in admiralty for breach of contract of affreightment. The Ann Arbor, Case No. 408."

Since then the Supreme Court has held that:

"Canal Boats towed by animals are within the jurisdiction." 24 Sup. Ct. Rep., Page 8, 191 U. S. 17. Perry v. Haines.

"If the business or employment of a vessel appertain to travel or trade and commerce on the water, it is subject to the admiralty jurisdiction, whatever may be its size, form, capacity, or means of propulsion. The General Cass, Case No. 5,307.

"A barge without any propelling power or rudder, used as a transport in New York harbor, is a vessel engaged in maritime service upon navigable waters.—Haslet v. The Enterprise, Case No. 6,197.

"A floating elevator, used in the harbor of New York, though without motive power or capacity for

cargo, is a vessel subject to a maritime lien.—The Hezekiah Baldwin, Case No. 6,449.

"Steamboats and lighters engaged in trade or commerce on tide water and the seamen employed on board are within the admiralty jurisdiction, but not ferry boats, or those engaged in ordinary traffic along the shores of a river.—Thackery v. The Farmer of Salem, Case No. 13,852.

"The maritime law does not apply to a steam ferryboat, running between Washington and Alexandria.—Harris v. Nugent, Case No. 6,126.

"A vessel plying between points on opposite sides of the Mississippi River, six miles apart, though run by a company owning a ferry franchise, is subject to admiralty jurisdiction.—The Gate City, Case No. 5,267.

"Steam ferryboats used between two cities in different states are subject to admiralty jurisdiction, as comprising commerce among the states.—The Cheeseman v. Two Ferry-Boats, Case No. 2,633.

"Flat boats and coal barges used to transport merchandise down stream, and broken up and sold for lumber at the end of their voyage, are not subject to admiralty jurisdiction.—Jones v. Coal Barges, Case No. 7,458."

And yet these coal barges have since that time been constantly held to be within the admiralty jurisdiction.

"Admiralty jurisdiction extends to lighters employed in carrying lumber out to vessels lying in deep water.—The General Cass, Case No. 5,307."

"The fact that such lighters are not enrolled or licensed does not affect the question of jurisdiction. —The General Cass, Case No. 5,307."

"A wire cable in a navigable stream was held within the admiralty jurisdiction, 242 Fed. Rep., Page 168, Toledo."

Jurisdiction has been upheld in the case of—

Rafts of logs in navigable river, 33 F. 511 T. & P. M. No. 2.

Steam dredge, 53 F. 687, The Atlantic.

Raft of cross ties being brought to market, 40 F. 596, Seabrook v. Raft Cross Ties.

Bath-houses built on boats and designed for transportation, 61 F. 692, Tebo v. City of New York.

Barge for carrying brick, 36 F. 607, Disbrow v. Walsch Brothers.

A structure afloat eleven feet by twenty-three, feet supporting floor and used for stowing cars and sails of people landing skiffs and small boats and landing at it, and for egress from small boats to shore and tied to shore by ropes. 30 F. 269, Woodruff v. One Covered Scow.

Scow for carrying ballast to and from vessels with no power of propelling and no rudder, 3 F. 411, Endner v. Greco.

Dismantled steamboat moored on a navigable river, being repaired and altered for use as a wharf boat, 9 F. 476, Old Natchez.

Barge for storage and transportation of grain, 48 F. 566, The Wilmington.

Dredge for digging earth under water in channel held as watercraft in connection with scows for transporting the dirt, 22 F. 449, The Alabama.

Pump-boat, consisting of a floating structure equipped with engines, boilers, pumps, pipes and capstans used for pumping out coal barges which can be moved on water by means of poles or rods attached to its capstans or towed. 169 F. 895, Charles Barnes Co. v. One Dredge Boat.

Hydraulic dredge, 208 F. 862 Richmond D. Company v. Standard A. D. Company.

Abandoned wharf, being a floating structure, 251 F. 856, The Bart Tully.

In new work of Corpus Juris, Volume I, Page 1236, Section 60, on "Admiralty" this work finds:

> "The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water; and if the business or employment of a vessel appertain to travel or trade and commerce on the water, it is subject to the admiralty jurisdiction whatever may be its size, form, capacity, or means of propulsion. A vessel does not cease to be subject to admiralty jurisdiction while lying at a wharf or in a dry dock, or while resting on the bottom during low tide. Nor is it necessary that the transportation which the vessel is intended to effect be of something that is temporarily aboard."

Now the Court found in Cope v. Vallette Dry Dock Company, 7 Sup. Ct. 336, 119 U. S. 625, that "at the time of the alleged salvage services the dock had been moored and lying at its usual place since 1866, (the decision was in 1877)"; and it spoke of this condition as being permanent; and it further found that it was merely an oblong box with a flat bottom and perpendicular sides or nothing more than pieces of lumber, fastened together and placed upon the water to receive vessels for repair and having engines that could only be used for pumping.

Considering later cases it is fair to suggest, in light of later decisions, that the structures with which the dock was compared, a ferry bridge, *a sailor's meeting house* moored to the wharf and *kept in place by a paling of surrounding piles*, wharf or warehouse projecting into the water, and the like were for land commerce, not sea commerce and were in no sense concerned in the moving and repair of ships or used solely for commerce at sea and were not such moving structures as these modern steel dry docks and were not anchored out in the navigable stream in such a way as to be instantly moved where business might suggest. This decision further used this phraseology "but when they have no connection with a ship or vessel some authorities are against the claim and *others are in favor of it.*" This is in reference to salvage for rescuing goods lost at sea or found floating on the surface or cast upon the shore.

A later decision which seems to me much in point is the case of Latta and Terry Construction Co. v. Raithmoor, 36 Sup., Page 515, 516—(241 U. S. 166). I quote from this decision because I believe it is a far progress from the Vallette decision.

> "The decisions of this Court with respect to the jurisdiction in cases of tort make the question to be determined a very narrow one. In The Plymouth (Hough v. Western Transp. Co.) 3 Wall. 20, 36, 18 L. ed. 125, 128, it was broadly declared that 'the whole, or at least the substantial, cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends—on the high seas or the navigable waters.' Accordingly it was held that a libel for damage to a wharf and storehouses, caused by a fire started on a vessel through negligence, was beyond the limit of admiralty cognizance, as the damage was wholly done, and the wrong was thus consummated, upon the land. Upon this ground, the jurisdiction of the District Court to entertain a petition for the limitation of the liability of the ship-owner in such a case was denied in Exparte Phenix Ins. Co., 118 U. S. 610, 30 L. ed. 274, 7 Sup. Ct. Rep. 25. The principle was stated in Johnson v. Chicago & P. Elevator Co., 119 U. S. 388, 397, 30 L. ed. 447, 7 Sup. Ct. Rep. 254. And see Knapp S. & C. Co., v. McCaffrey, 177 U. S. 638, 643, 44 L. ed. 921, 924, 20 Sup. Ct. Rep. 824; Homer Ramsdell Transp. Co. v. La. Compagnie Generale Transatlantique, 182 U. S. 406, 411, 45 L. ed. 1155, 1159, 21 Sup. Ct. Rep. 831. But in the Blackheath (United States v. Evans) 195 U. S. 361, 49 L. ed. 236, 25 Sup. Ct.

Rep. 46, a distinction was drawn, and the jurisdiction of the admiralty was upheld in the case of an injury caused by a vessel in negligently running into a beacon which stood 15 or 20 feet from the the channel of Mobile river, or bay, in water 12 or 15 feet deep, and was built on piles driven firmly into the bottom. The Court pointed out the essential basis of the decision, in saying: 'It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty,—a beacon emerging from the water, *injured* by the motion of the vessel, by a *continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically* land, through a connection at the bottom of the sea.' (Id., p. 367.) It was suggested in the concurring opinion of Mr. Justice Brown (Id., p. 368) *that the decision practically overruled the earlier cases*, and that it recognized the principle of the English statute extending the jurisdiction of the Admiralty Court to 'any claim for damages by any ship.' This consequence, however, was expressly denied in Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co., 208 U. S. 316, 320, 52 L. Ed. 508, 512, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 1215. In that case it was decided that the admiralty did not have jurisdiction of a claim for damages caused by a vessel adrift, through its alleged fault, to the center pier of a bridge spanning a navigable river and to a shore abutment and dock. Referring to The Blackheath, and drawing the distinction we have noted, the Court said: 'The damage' (that is, in The Blackheath) 'was to property located in navigable waters, solely an aid to navigation and maritime in nature,

and having no other purpose or function * * *. But the bridges, shore docks, protection piling, piers, etc.' (of the Cleveland Terminal Company) 'pertained to the land. *They were structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extentions of the shore, and aids to commerce on land as such.*' The decision in The Troy, 208 U. S. 321, 52 L. Ed. 512, 28 Sup. Ct. Rep. 416, was to the same effect. The steamer Troy had collided with the center pier of a swinging span over the St. Louis river, a navigable stream, and the jurisdiction of the admiralty of a libel for the injury was denied. See also Phoenix Constr. Co. v. The Poughkeepsie, 212 U. S. 558, 53 L. Ed. 651, 29 Sup. Ct. Rep. 687; Martin v. West, 222 U. S. 191, 197, 56 L. Ed. 159, 162, 36 L. R. A. (N. S.) 592, 32 Sup. Ct. Rep. 42.

If, then, in the present instance, the metal cap of the beacon had been in place, the rip-rap deposited, and the beacon put into actual service, the case would fall exactly within the ruling of The Blackheath, and the admiralty would have jurisdiction although the structure was attached to the bottom.

It was being built on shore and awaiting the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached,—at least in all cases where the wrong was of a maritime character.

"It is urged that the government might abandon its plan; but there has been no abandonment. The question is not as to an abandoned mass, but as to a beacon in course of erection. Even a completed beacon might be abandoned, and whatever question might arise in such a case is not presented here. Again, an analogy is suggestion to the case of a vessel which is being constructed on shore, but the argument falls short, as it is to be remembered that as soon as a vessel is launched, although still incomplete, it is subject to the admiralty jurisdiction."

The last case to be considered by Your Honors is the case of the Southern Lighterage and Wrecking Company v. United States of America. The decision in the District Court, No. 284 Fed. Rep. 978, is as follows:

"In this case a libel was filed against the United States, to recover damages caused to a cluster of piling in the Mississippi River, at the foot of Egania street, in the City of New Orleans, by a collision with said piling by the steamship Oscaloosa, operated by the Emergency Fleet Corporation.

"An exception is filed to the jurisdiction of the Court to entertain the case in admiralty. It is well settled that admiralty has no jurisdiction over a case arising from the collision of a vessel with a wharf, or the piers of a bridge or any structure connected with land, although it is partly in water. It is also settled that admiralty has jurisdiction over a case arising from a collision between a vessel and a buoy, or a light house connected with the bottom of a river, on the theory that they are aids to navigation.

> "It is the contention of libelant that the clusters of piling in the river are aids to navigation *similar to a buoy and are not intended to act as a wharf.* I do not think the case comes within the exception, and the piling must be held to be in the nature of a wharf, or a structure intended to facilitate commerce on land. They do not mark the channel as a buoy would, and if they serve any purpose at all it is for the mooring of vessels or the keeping of them in deep water when unloading cargo, in which case they would come under the general rule. If they were put there for the purpose of protecting the bank, or protecting something that might be moored between them and the bank, I think the same rule would apply."

This matter was appealed to the Supreme Court and the decision was affirmed by an equally divided Court as appears in the 260 U. S., page 699, No. 60, 43 Sup. Ct. Rep., page 91, on October 23, 1922.

I believe that the fact that the Court divided on these clusters of piling shows an appreciation of the necessity of including in admiralty jurisdiction the matters which as a matter of fact pertain solely to the ships and vessels, their navigation and commerce at sea and matters which should be in admiralty because a part of the cause of action invariably is within the admiralty jurisdiction while a part is without causing loss, confusion and great uncertainty.

Injury to the ship by the piling is admiralty jurisdiction. Why, for the sake of justice and fairness and

reasonableness, should injury to the piling not be within the Admiralty Jurisdiction? Injury to a ship by the dock is within the Admiralty Jurisdiction. Why should not the dock be within the Admiralty Jurisdiction so that an action in rem as in this case could apply in order to really reimburse and protect the ship? If the ship be injured by the dock and at the same time the dock be injured by the ship, what reason or justice requires that one should be within the Admiralty Jurisdiction where matters of this kind are well understood, while the other be within the State Courts where matters of this kind are an unexplored country? Why in the present case should the claim for repairs to the ship be within the Admiralty and a right in rem; but the damages to the ship be merely a right in personam; and damages occasioned to the dock which is out in the river and in all respects a vessel, be refused consideration in the Admiralty Courts which best understand the conditions and circumstances and be relegated to the State Courts?

As time goes on and new inventions come about and constructions change, why should not the definition of a vessel change or the Jurisdiction in Admiralty be broadened?

In Rodd v Heartt (88 U. S. 558-609) 22 L. C. P. Co., page 660, this Court found:

> "The principle question presented by the appeal, therefore, is, whether the furnishing to a vessel on

her credit at her home port needful repairs and supplies, creates a maritime lien. If it does, such lien would take precedence of a mortgage given for the payment of money generally, and the decree must be affirmed. If it does not, the decree must be reversed, unless the appellees can sustain themselves on some other ground.

"This very question was decided by this Court adversely to the lien more than fifty years ago in the case of The General Smith, reported in 4 Wheaton, 438, and that decision has ever since been adhered to, except occasionally in some of the District Courts. A solemn judgment relied on so long by the commercial community as a rule of property and the law of the land, ought not to be overruled except for very cogent reasons. If, however, in the progress of investigation, and with the new lights that have been thrown upon the whole subject of maritime law and admiralty jurisdiction, a more rational view of the question demands an adverse ruling in order to preserve harmony and logical consistency in the general system, the Court might, perhaps, if no evil consequences of a glaring character were likely to ensue, feel constrained to adopt it. But if no such necessity exists, we ought not to permit any consideration of mere expediency or love of scientific completeness, to draw us into a substantial change of the received law. The additional security which has been extended to bills of sale and mortgages on ships and vessels since the passage of the Act for recording them in the custom-house; and the confidence with which purchasers and mortgagees have invested money therein under the existing course of decisions on this

subject, have placed a large amount of property at undue hazard, if those decisions may lightly or without grave cause be disturbed."

Page 661:

"But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country peculiarities exist either as to some of the rules, or in the mode of enforcing them."

"Hence the adoption of all commercial nations (our own included) of the general maritime law as the basis and ground-work of all their maritime regulations. But no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations."

Page 662:

"Guided by these sound principles, this Court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times."

My temerity in hoping that the Court will hold that the modern dry dock, such as in this case, within the admiralty jurisdiction and subject to salvage, is due to my experience as proctor for tugs and crew in serious salvage work saving in the case of fire two of these immense docks and the ships in them, and of the present dock when floating down the river after the withdrawal of the steamship and because it seems to be right from a legal standpoint as well as necessary and just. In both cases nothing except the work of the tugs and crews saved or could have saved the docks from destruction and in the case of the floating dock from injuring or destroying other vessels.

As these modern structures made of steel and of tremendous size are not on or attached to land they cannot be protected or handled from land. Because they are "vessels" and because they are out in the deep river, nothing can help them whether breaking loose, sinking or on fire except other vessels and seamen with their salvage training, accessories, fire-fighting apparatus, etc., exactly as and in the same proportion as in the case of technical ships. Whether it is fire or whether it is sinking or whether it is breaking adrift—they must call upon and must use the same and such services as used by steamships. And these services are used and must be used not only to save the dock but as a protection against the damage which the dock's destruction may do to all other ships. And yet these services cannot be called for unless they receive salvage

award. The owners of valuable tugs and the seamen will not risk property and life just for glory and the advantage of private property holders when they know and feel that as a matter of fact they are doing salvage work.

Why should it be salvage if the ship is saved and why should it not be salvage if the dock out in the river which holds said ship is saved, is the question in their minds. Why should it be salvaged if the dock is being towed from New York to New Orleans and not when temporarily anchored by wharf in New Orleans? It would seem to be both necessary and fair that these new and immense floating docks should be the subject to salvage. It would seem to be a wise and just precaution against their being allowed to injure and damage shipping when in trouble. Nor can one find any serious burden or injury to such dry docks should they be held subject to Admiralty Jurisdiction because they now carry the general maritime insurance which includes protection against salvage. These matters are outside the record, but I think can and should be considered by the Court since the District Court finds that "the characteristics of dry docks are so well known that the Court could take notice" that there was no appreciable difference between the Vallette dock and the one in present case.

As a matter of fact, in the case of "The Neshaminy", 228 Federal Reporter 286, the Court found that in a case where a barge was in a floating dry dock under-

going repairs the fire had crept into the interior of the dock and extended down between its inner and outer walls and *that this dry dock with this barge was beyond the reach of the local fire department.*

With a dock on land or a dock enclosed on all sides by land we are not concerned. These would be permanently on the shore or fastened to the shore. I do not know all the characteristics of the Vallette Dry Dock but I presume considering the year when it was built, 1866, it must have been flimsy in comparison with these modern steel docks and intended to be permanently located, as the Court suggested. The Court found the dock to be merely an oblong box with a flat bottom and perpendicular sides or nothing more than pieces of lumber, fastened together and placed upon the water to receive vessels for repair and having engines that could only be used for pumping. It would appear from this language that it could not be moved any distance through the water.

In the Vallette case the Court compares docks with swinging bridges or piers extending out in the water. Is there not a very clear distinction between these several objects in that a dock is solely for the purpose of navigation? While is it not true that a swinging bridge or pier or a dock is for land interests or land commerce?

I do not think the Vallette case can for all time be held to shut out from admiralty jurisdiction a structure called a "Dry Dock". A dry dock, as known some forty

years ago, certainly could not forever be the measure of so-called "Dry Docks" for admiralty jurisdiction. Would it be proper to refuse to recognize the new farm wagons or cars using the "caterpillar" system of movement as vehicles because a decision defining rights of vehicles had once found a vehicle to be a structure moving over land on wheels? Since the time of the Vallette case the admiralty jurisdiction has advanced far in taking in structures that float or are in navigable waters and yet have no means of moving themselves and do not engage in commerce at sea.

In the present case we are dealing with an immense steel dock worth some million dollars, constructed and fitted to be towed over the ocean to any distance, and in fact towed to New Orleans from around New York; to be moved from place to place as business requirements suggested; not intended to be put in one spot and kept there; with engines to move its capstans and to raise and sink the dock; with power to haul ships into the dock and to move itself to and from its parallel position with the shore in order to take in or put out a ship; fastened by anchors out in the deep water and held by cables, fastened, of course, as well to shore; able even to move itself from position to position by its capstans; to be used for no other purpose than the repair of and for work on ships and vessels and in every way for the sole use and benefit of navigation; and so there would seem to be no reason why it should not be con-

sidered a ship or vessel subject to salvage and subject to the admiralty jurisdiction.

We respectfully ask that the judgment of the District Court maintaining the exception to jurisdiction be reversed and that the case be remanded for trial in that Court.

Respectfully submitted,

RICHARD B. MONTGOMERY,
Proctor for Appellant.

Office Supreme Court,
FILED
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NO. 307

United States Supreme Court

OCTOBER TERM, 1923

NYANZA STEAMSHIP COMPANY, LTD.,
Appellant,

versus

JAHNCKE DRY DOCK NO. 1, JAHNCKE DRY DOCKS, INC., ET AL.,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLEE.

GEO. H. TERRIBERRY,
Proctor for Appellee.

February, 1924.

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Appeal from the District Court of the United States for the Eastern District of Louisiana.

BRIEF FOR APPELLEE.

ABSTRACT OF CASE.

This appeal grows out of the dismissal by the District Court of the United States for the Eastern District of Louisiana, upon the exceptions to the Court's jurisdiction, of a libel for salvage both *in rem* against the Jahncke Dry Dock and *in personam* against its owner, and *in rem* for damages against the dry dock. The Court retained juris-

diction of that portion of the libel, setting out a cause of action *in personam* against the owner for damages to the ship.

The dismissal was upon the authority of *Cope v. Vallette Dry Dock Company*, 119 U. S. 625, 30 L. Ed. 501. The District Court in its opinion observed that libelant had endeavored to point out differences between the instant suit and the Vallette Dry Dock case; in commenting upon these "differences", the Court said:

> "At this day the characteristics of dry docks intended for the repairs of vessels are so well known that the Court may well take notice that there is no appreciable distinction between the dock in this case and the Vallette Dock, but in any event it is sufficiently clear from the allegations of the libel that the dock is a floating structure, moored in the harbor of New Orleans, and intended for the raising of vessel to facilitate repairs."

ARGUMENT.

The exception to the jurisdiction was based solely upon the authority of *Cope v. Vallette Dry Dock Company*. That case has stood unquestioned for thirty-seven years; it has never been criticised, nor has it been referred to by this Court with anything but approval.

In the case of *Perry v. Haines*, 191 U. S., 18, 48 L. Ed., 73, decided in 1903, this Court said:

> "There is no doubt of the proposition that a dry dock itself is not a subject of salvage service or of admiralty jurisdiction, because it is not used for the purpose of navigation. That was settled in *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625,

> 30 L. Ed. 501, 7 Sup. Ct. Rep. 336. But the case was put upon the express ground that a dry dock was like a ferry bridge or sailors' floating meeting house, and was no more used for the purpose of navigation than a wharf or a warehouse projecting into or upon the water."

The Vallette case was again referred to and was inferentially approved by the court in the case of *The Steamship Jefferson*, 215 U. S. 133, 54 L. Ed. 125, decided in 1909.

The appellee in this brief assumes that this Court will not be disposed to re-examine the law as laid down in a case that has been unquestioned for nearly forty years. The brief will, therefore, be devoted to pointing out the absence of any difference between the facts in this case and the case of the Vallette dock.

The only reference in the libel to the dry dock by way of description is that it is a

> "*movable and seagoing dry dock* with *power to move itself by means of a capstan*, and was *at times fastened to shore solely by ropes or cables and held by anchors in river and for temporary location*, and *to be moved where business requirements might designate its use*, and known as the Jahncke Steel Dock or Jahncke Dry Dock Number One, and *in every way a vessel.*"

The statement in appellant's brief, at page 31, that the dry dock was "in fact towed to New Orleans from around New York" is wholly without foundation so far as the record discloses.

The District Court, as heretofore stated, took notice that there *is no appreciable distinction between the dock in in this case and the Vallette Dock*, also stating in its

opinion that the characteristics of dry docks intended for the repair of vessels were well known. Our discussion of the alleged differences between the Vallette and Jahncke dry docks, we think will show that the Court took notice of these facts not without due deference to the allegations of the libel. But regardless of this *appellant has assigned no error to the notice of these facts*, and they are, therefore, conclusive in determining the status of the property involved.

Comparing appellant's description of the dry dock in the instant case with the Vallette dry dock:

"MOVABLE AND SEAGOING DRY DOCK."

Reference to the Vallette case would indicate that the dry dock was likewise movable. Nothing is said in the Vallette case as to whether or not the dry dock was seagoing, but as it was capable of raising large steamships entirely out of the water and was, even in those days, worth more than $200,000.00, it must have been a large and very substanital structure.

"WITH POWER TO MOVE ITSELF BY MEANS OF A CAPSTAN."

It will be noted that the libel nowhere alleges that the dry dock was designed or intended to move itself or that it has in a single instance ever done so. It merely says that it is "*with power* to move itself by means of a *capstan*". Since the libel alleges this, it must be accepted as true, but appellee is not precluded from showing this to be an obvious and ineffectual attempt to force a difference between this dry dock and the Vallette dry dock. The real and only

purposes of the dock's capstans are for use in hauling ships into the dock or to tighten or slacken its lines to shore, as occasions may require. This appears clearly from the fourth article of the libel, which described the "NYANZA" entering the dock, and is so stated at page 2 of appellant's brief. Would any sane person think of shifting the dock's position in the harbor by means of her capstan? Or, if it were desirable merely to bring the dock to the opposite side of the river, would the owners dare to stretch a line from the opposite bank and let the dock haul herself across by means of a capstan? We think not. The dry dock's complete inability to navigate herself can perhaps best be shown by calling the Court's attention to Article V of the libel, where it is stated that after the dry dock had broken adrift *"it was powerless to handle itself"*. Adopting the words of this Court in describing the Vallette dry dock "it was not designed for navigation and could not be practically used therefore".

"AT TIMES FASTENED TO SHORE SOLELY BY ROPES OR CABLES AND HELD BY ANCHORS IN RIVER AND FOR TEMPORARY LOCATION."

While the libel states that "at times" the dry dock was fastened to the shore, it is significant that it fails to state that it ever had been on any occasion moored or fastened in any other manner.

"TO BE MOORED WHERE BUSINESS REQUIREMENTS MIGHT DESIGNATE ITS USE."

It is not alleged that business requirements ever have designated, or ever will designate its removal to another place.

In fact, it is nowhere alleged in the libel that the Jahncke dry dock, from the time of its construction until the breaking adrift on May 18, 1922, had ever at any time been moored or fastened at any place other than the Jahncke Plant in New Orleans.

The appellant's description of the dry dock refers solely to the movements which the dry dock *might have made* had the owners so desired, and not to any movements actually made.

"IN EVERY WAY A VESSEL."

This allegation was made in support of the Court's jurisdiction, is mere conclusion, is, therefore, one of law, and is controlled by the descriptive allegations of the libel together with the status of the structure as found by the Court.

CONCLUSION.

The Jahncke dry dock is, therefore, the same kind of structure as the Vallette dry dock. Though we are not informed, it may have been larger and stronger and may have contained slight improvements, but there is no "appreciable distinction" between them. We ask that the jurisprudence of this Court be adhered to.

We respectfully pray that the judgment of the District Court maintaining the exception to jurisdiction be affirmed.

GEO. H. TERRIBERRY,
Proctor for Appellee.

February, 1924.

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Supreme Court of the United States.

October Term, 1955.

No. 307.

NYANZA STEAMSHIP COMPANY, LTD.,

Appellant,

v.

JAHNCKE DRY DOCK NO. 1, JAHNCKE DRY DOCKS, INC., ET AL.,

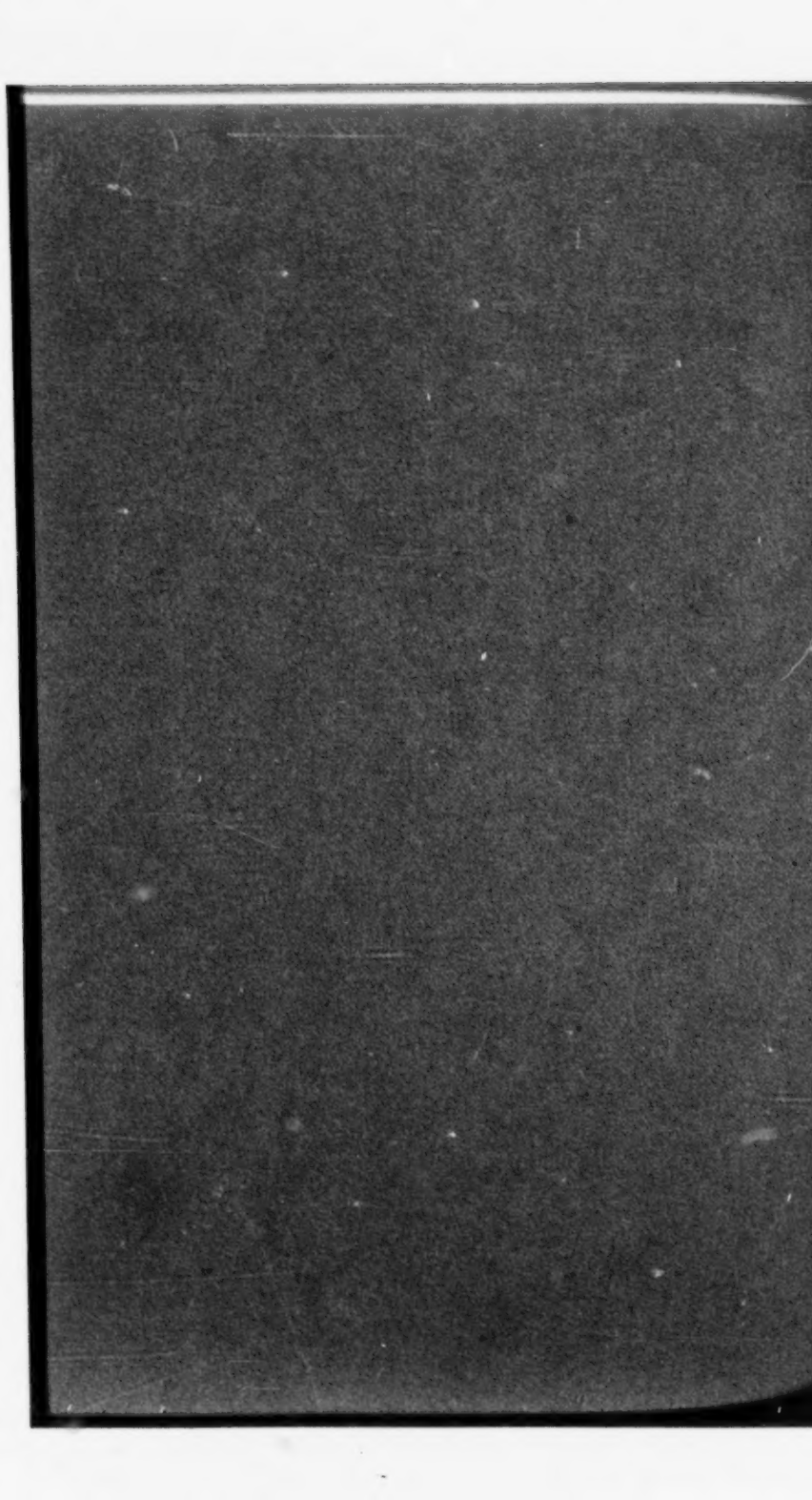
Appellees.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Brief for Appellees on Question of Right to Appeal.

Attorneys for Appellees.

March, 1956.



Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 307.

NYANZA STEAMSHIP COMPANY, LTD.,
APPELLANT,
v.
JAHNCKE DRY DOCK NO. 1, JAHNCKE DRY DOCKS, INC., ET AL.
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF ON QUESTION OF FINALITY OF JUDGMENT.

May it please the Court:

The pleadings in this case cover—

First, libel *in rem* for salvage;
Second, libel *in personam* for salvage;
Third, libel *in rem* for damages;
Fourth, libel *in personam* for damages.

There are two distinct causes of action, in no way depending one upon another; that is, the action for salvage and the action for damages.

There are two distinct persons involved in this case: the ship in the matter of salvage, the ship in the matter of damages, and the Jahncke Dry Docks, Incorporated, in the matter of salvage and again in the matter of damages.

If the ship be released as to salvage, then the evidence and the matters involved in the action *in rem* for damages in no way apply to or cover the ship in so far as the action *in rem* for salvage is concerned, and the reverse is true.

If the ship be released by dismissal of the libel in the matter of salvage, then the claim *in rem* for salvage is for all time lost as against the ship. The same is true in regard to the claim against the ship for damages, if the ship be released. Once the ship is released, the cause of action as against the ship, whether in salvage or in damages, is of course lost, and the appellant in this case is forever cut off from its rights.

The opinion in this case (transcript, 9) was filed February 21, 1923. The decree was filed March 31, 1923. It was, as will appear, in every way final, and was so considered by the judge who for this reason certified the jurisdictional question (transcript, 14). The decree (transcript, 11) reads: "It is ordered, adjudged, decreed that the exception to the jurisdiction be maintained and accordingly that insofar as the action is either in rem or in personam for salvage and in rem for damage, the same be, and it is ordered dismissed at libellant's costs."

This is a final decree, and without reservation dismisses the defendant, the Dry Dock, from the court in so far as the ship is sued *in rem* or *in personam* for salvage and *in rem* for damage. If no further action

is taken by libellant, the ship walks out of court free from any claim against her.

This decree is full and complete in so far as the ship is concerned, and there could be no possible reason for taking any further steps to release the ship as against the libellant. I take it that, on the face of this decree, the marshal would release the ship at once, or, if anything at all was required, it would be merely an *ex parte* or informal order of the judge, granted as a matter of right and without consideration of the libellant.

It is to be noted that there is no question of costs involved as against the ship. It is to be noted that there is absolutely not one single thing to be complied with or done by the ship subsequent to this decree. The decree is a complete release of the ship, without the slightest condition or requirement. In the words used in the decision of *Park Ridge* v. *Murphy*, 208 Ill. 365, "it is, if not an entire controversy, a definite and separate branch of the case, which finally disposes of the rights of the parties."

The decree of the judge is in no sense an incidental order and in no sense a mere passing on evidence. It is a final disposition of a definite and complete cause of action, leaving no further matter to be considered.

Referring to rule 21, Benedict, section 385, I find it states: "in all cases of a final decree for the payment of money, the libellant SHALL have a writ of fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods or chattels, lands and tenements, or other real estate of the defendant or stipulators." Now in this case, is not the claimant entitled of right under the above decree to an im-

mediate order for his ship? Is not the judgment then in this case a final decree?

Referring again to the question of there being anything further to be done after this decree, is it not also covered by the case of *Stokes* v. *Williams* in the 241 U.S. 681, where the court found that a decree authorizing the receiver of a corporation to sell at private sale all the assets and rights thereof according to the terms of an offer, *objections to which were heard and confirmation of which is unnecessary* and *not contemplated*, is final and applicable?

I do not know that it is pertinent, but it does seem to me so, to consider the admiralty rule 49, under which transcripts are brought up and in which one finds no mention of the order of the release of a ship as in any way being a necessary part of the final decree. Clause I requires, as part of transcript, "any orders and opinions of the court." This apparently applies to all intermediate orders. Then clause J provides that "the final decree" shall be made part of the transcript, but nothing is said as to any further order being made a part of the transcript.

Benedict, in his work on Admiralty, section 543, in regard to the final decree says that the usual form of decree against defendant, whether suit *in rem* or *in personam*, is "that the libel be dismissed with or without costs." While these matters may or may not be pertinent, they still suggest that, in the practice and interpretation of the form of court proceedings, the decree such as in this case, dismissing the libel with costs, is the final decree.

This brings us to the *Pesaro* case, 255 U.S. 216. The *Pesaro* was sued *in rem* in admiralty. The ship was

arrested. Afterwards, upon a direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession, and therefore was not subject to the court's process, the court vacated the arrest. The District Court certified the ground of its decision as follows: "I do certify that the vessel was released from arrest by me by a final decree herein, solely because I deemed that the United States District Court, sitting as a Court of Admiralty, has no jurisdiction to subject to its process a steamship, which, by the suggestion of the said Italian Ambassador filed in this Court, was represented to be the public property and in the possession of the Kingdom of Italy."

The authority of the court to entertain appeal was challenged upon the ground that it was not final, because it did not formally dismiss the libel.

The court found "That it does not formally do so is true, but this is not decisive. The suit is *in rem*—is against the ship. The decree holds for naught the process under which the ship was arrested, declares she is not subject to any such process and directs her release—in other words, dismisses her without day. Thus the decree ends the suit as effectually as if it formally dismissed the libel. Obviously, therefore, it is final. That it was intended to be so is shown by the court's certificate."

In the above case, as long as there was no decree dismissing the libel, there must of necessity have been an order releasing the ship. For this reason the order in this case was an important and final decree of the court. Your honors stated, however, that this decree ended the suit as effectively "as *if* it formally dis-

missed the libel." It would seem obvious that the formal dismissal of the libel was a more effective ending of the suit than the mere order releasing the ship. The complete dismissal of the libel in the *Nyanza* case must therefore be more effective than a mere in-between order releasing the ship, and would seem, in the language of this decision, "obviously final."

Just as the court in this *Pesaro* case says that the District Court intended the decree to be final "is shown by the court's certificate of the judge," in this *Nyanza* case his honor the judge of the District Court is shown by his certificate to have intended his decree dismissing the libel for salvage *in rem* and for damages *in rem* to be final of all matters as against the ship.

Is it not absolutely clear that this dismissal of the libel by Judge Foster without any condition or further thing to be done on the part of the ship, in the language of the court in the *Pesaro* case, "holds for naught the process under which the ship was arrested"?

In the case of *Bowker* v. *United States*, 186 U.S. 135, where a cross-libel was dismissed for want of jurisdiction before the whole case was heard and determined, the court held that this decree of dismissal was not a final decree, but this was because the litigation *between the parties on the merits embraced the right of libellant to recover because of the fault of respondent*, as well as the *right of respondent to recover because of the fault* of libellant, and *until the question as to which of the parties was at fault*, or whether both were, was determined, the litigation cannot be said to have terminated. Now there can, in the *Nyanza* case, be nothing left *as to salvage* which can be determined as to the liability of either the

libellant or the ship. It is therefore a decree which is final, and leaves nothing to be done.

Referring to the case of *Collins* v. *Miller*, 252 U.S. 364, the court found as follows: "Was the judgment appealed from a final one? A single petition for a writ of *habeas corpus* thus sets forth detention of the relator on three separate affidavits. As to the commitment of one of these the judgment entered by Judge Grubb directed that the writ be 'denied.' Such denial, or more appropriately dismissal, of the writ would obviously have been a final judgment, *if it had stood alone*. *McNamara* v. *Henkel*, 226 U. S. 520, 523. But the judgment appealed from dealt also with the detention on the other two affidavits. It declared that 'the writs of *habeas corpus* are granted' as to the commitments on the other two affidavits and ordered that the case be remanded for further hearing before Judge Foster.

"What was thus called granting the writ was not a discharge of the prisoner, deferred as in *In re Medley*, 134 U. S. 160, and in *In re Bonner*, 151 U. S. 242. . . .

"The prisoner remained under the authority of the District Court (see Mr. Justice Nelson in *In re Kaine*, 14 How. 103, 133-4) [14 L. Ed. 345]; and as the writ of *habeas corpus* had not been disposed of there so far as concerned the detention on two of the three affidavits, the decision below on that branch of the case was not final."

In this case, because the prisoner remained under the authority of the District Court, by reason of his detention under the two other affidavits, this case would not seem to apply to the instant case, where there was nothing further in the case by reason of which the ship could be detained in the court.

The court further found, on page 370: "The rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. . . . The seeming exception to this rule by which an adjudication final in its nature of matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final so as to authorize an appeal without awaiting the termination of the general litigation below, has no application here."

Now this requirement would seem to me to apply to all causes of action arising out of the same general subject—as, for instance, all causes of action arising out of negligence which caused the damages or all causes of action arising out of salvage. But the "general subject-matter" could not be both salvage and damages, as each is a distinct subject-matter. But if *I am wrong,* then certainly this *Nyanza* case *comes under the exception noted,* and the decree on the action for salvage *in rem* is a decree in its nature of a matter distinct from the general subject, just like the claim to property presented by intervening petition in receivership.

Again, in the case of the *Oneida Navigation Corporation* v. *W. & S. Job & Company, Incorporated,* 252 U.S. 521, the court states: "The petition to make W. & S. Job & Co., Inc., party defendants was merely an incident in the progress of the case in the District Court. The liability of indemnitors thereby sought to be enforced would in no event arise unless the vessel should be held liable. The petitioner had as

claimant denied liability in its answer to the libel and the issue thus raised had not been tried. While the decree dismissing the petition as to W. & S. Job & Co., Inc., was final as to them, there was no decree disposing of the case below. A case may not be brought here in fragments. This court has jurisdiction under § 238 of the Judicial Code [Comp. St. 1215], as under other sections, only from judgments which are both final and complete."

I do not think that this case can apply, because, as the court says, the petition to make W. & S. Job & Company, Incorporated, a party defendant "was merely an incident in the progress of the case." Under no conceivable interpretation does it seem to me that the action *in rem* for salvage and *in rem* for damages can, either one or both, be called *a mere incident* in the progress of the case. The action *in rem* for salvage and *in personam* for salvage *is the whole case* as to salvage. And the action *in rem* for damages is the whole case against the ship as against the world for its lien for damages. The action *in personam* for damages may rest upon a different law and be thrown out of court, while the action for damages against the ship may remain effective.

In *Scriven* v. *North*, 134 Fed. 366, the Circuit Court of Appeals holds that, when a suit contains several distinct causes of action, and a judgment as to some is final in its terms, an appeal may be taken as to the causes on which the judgment is final (holding that, where a bill in the Circuit Court set up *four distinct causes* of action, one for infringement of a patent, one for infringement of a trademark, and two for unfair competition, a decree dismissing the bill as to the

first three causes of action was a "final decision" thereon, in such sense as to be appealable, although, as to the fourth cause of action, the bill was sustained and an accounting was directed thereunder).

This case, just as in the present case, differs from cases where two patents are claimed to be infringed in the same suit, because there it may be well said you have two identical causes of action covered by the same law and liabilities and accounting and identical parties. Distinct causes of action, distinct laws governing, and distinct parties, as in the *Nyanza* case, go to make up a very different situation from that in trademark cases.

In 5 Wall. p. 820, *Withenbury* v. *United States*. In this case several libels were filed for the condemnation, as prize of war, of *large quantities of cotton and other property* captured on the interior navigable waters of the United States, or on land adjacent thereto. On motion these libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property libelled. Among these claims was that of Withenbury & Doyle. They denied the validity of the capture, and insisted on their own title to 935 bales of the cotton (a part). This claim was dismissed with costs. An appeal was taken from this decree to the Supreme Court. No disposition had been made of the libel or of the cotton or its proceeds; the suit still remained pending in the District Court. The appellant claimed that it was a definite sentence in admiralty, which was a final decree; that it dismissed claimant from the case. The chief justice found that "It appears from the record that the decree disposed of the whole matter in controversy upon the claim of

Withenbury & Doyle. It was final as to them and their rights . . . It left nothing to be litigated between these parties. . . .

"We think that such a decree in a prize cause must be regarded as final within the meaning of the Judiciary Acts, and that we have jurisdiction of the appeal from it.

"The appeals in The Bermuda case, and in the case of the Alexander cotton, were of the same character with that now before us. In neither of these cases had all matters arising upon the libel and the claims been finally disposed of . . .

"It is true, that in the cases just referred to no question of jurisdiction was made at the bar, but it existed necessarily in each cause, and was practically determined in favor of the jurisdiction, and, as we still think, rightly determined."

Referring to this case, *Thomson* v. *Dean*, 7 Wall. 346, held a decree final which settles a controversy as to the ownership of stock, but retains the bill for the purpose of adjusting accounts.

Now it seems to me that this case clearly covers the *Nyanza* case and holds that the decree therein is final and such as warrants the appeal. Clearly the libels *in rem* for salvage and *in personam* for salvage and *in rem* for damages and *in personam* for damages are nothing more than a series of separate libels for separate matters (salvage and damages), between separate parties (the Jahncke Dry Dock No. 1, the vessel, and the corporation, the Jahncke Dry Dock, Inc., the owner of other docks), which the Admiralty Rules and the judge allow to be consolidated. And when the judge dismissed the libel for salvage against

the vessel and the one *in personam* against the corporation and on the one *in rem* for damages against the ship, the decree disposed of the *whole matter* in controversy upon the claim of the libellant against the ship for salvage, or against the corporation for salvage, or against the ship for damages. It was final as to the ship and as to salvage certainly, and it left nothing to be litigated between the parties, for the ship was out of the case completely.

I do not know just what would be the course if it was not considered a final decree. If the case went on, testimony could only be taken as to the action in damages *in personam*. There would be an appeal, I presume, to the Circuit Court of Appeals. The matter would then be appealed to this court. If the jurisdiction was maintained, the case would go all the way back to the District Court for testimony, and would possibly then again go to the Circuit Court of Appeals, because in all probability there would be other matters in dispute besides the one of jurisdiction; and then again, for the second time, it would possibly come to this court. So in this event the court would try the case in fragments. It would seem, therefore, both a wise, convenient, time-saving benefit that the decree in this case should be considered final, as well as it would seem to be a legal fact that the decree in this case was final.

We respectfully urge that the decree here would seem, as stated in the Illinois case, in every way to be a final decree—that is, one which finally disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate branch thereof. Indeed the matter of salvage and the matter

of damages are not one subject, but entirely different subjects. And the Jahncke Dry Dock No. 1, the vessel, and the Jahncke Dry Dock, Inc., the corporation, are entirely separate persons. In this suit are consolidated several libels for separate subject-matters between separate parties, and the dismissal of the libel for salvage against the ship is certainly a final decree disposing of *all matters* of salvage against the ship as to the libellant, and is final as to them and their rights, and leaves nothing to be litigated as between them. The court, we think, undoubtedly has jurisdiction of this appeal.

Respectfully submitted,

RICHARD B. MONTGOMERY,

Proctor for Appellant.

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No. 307

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

NYANZA STEAMSHIP COMPANY, LTD.,
Appellant,

versus

JAHNCKE DRY DOCK NO. 1, JAHNCKE DRY DOCKS, INC., ET AL.,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

REPLY BRIEF FOR APPELLANT.

RICHARD B. MONTGOMERY,
Proctor for Appellant.

February, 1924.

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Appeal from the District Court of the United States for the Eastern District of Louisiana.

REPLY BRIEF FOR APPELLANT.

On page 4, appellee states that "Our discussion of the alleged differences between the Vallette dock and Jahncke Dry Dock No. 1, we think, will show that the Court took notice of these facts not without due deference to the allegations of the libel. But, regardless

of this, appellant has assigned no error to the notice of these facts, and they are therefore conclusive in determining the status of the property involved."

If there were characteristics of dry docks known to the Courts of which the Judge of the Lower Court could and did take notice, it must of course be presumed that this Court knows of the same characteristics and will take notice of them. If it does, it must be presumed that this Court knows that these modern steel sea-going dry docks are moved long distances over the ocean; are covered by general marine insurance; are so situated that whether it is a case of fire or of breaking away from mooring they cannot be helped or saved from shore but solely as a ship by tug boats or other vessels. If there are no characteristics known to this Court outside of the libel, there were none known to the Lower Court so far as this appeal is concerned. No assignment of error to the notice of these outside facts would be of any need or purpose, because unless the Upper Court knew the facts the only facts that Your Honors could consider would be the facts gathered from the undisputed libel.

The distinction between the Vallette dock and the present dock must be gathered from the statement of facts of the Court in the Vallette case which held the condition of the Vallette dock was permanent and that it was merely an oblong box with a flat bottom and perpendicular sides, or nothing more than pieces of lumber

fastened together and placed upon the water to receive vessels for repair and having engines that could only be used for pumping. Page 19 Original Brief.

The libel shows in this case that the steel dock was out in a deep river with a strong current; that it, by means of its capstans, hauled the ships into position; that it was held out in the river with anchors as well as hawsers attached to the shore; that it was so fastened that it could break loose; that it was in deep enough water to sink itself far below the keel of a large ship and still be floating; that it was a movable and sea-going dry dock with power to move itself by means of a capstan, and was at times fastened to shore solely by ropes or cables and held by anchors in the Mississippi River and for temporary location, and to be moved where business requirements might designate its use and known as the Jahncke Dock or Jahncke Dry Dock No. 1, and in every way a "vessel" and subject to admiralty jurisdiction, and at the time lying in the Mississippi River; that it is shown in the libel that the dock, while sunk deep enough in the River to take in the Steamship Nyanza was so much of a "vessel" that it floated safely when out in the middle of the River towed by the Nyanza and that after the Nyanza pulled out of the dock it floated safely in the River and was carried safely, as deeply sunk as it was, back to its landing. This would not seem to be in any way such a dock as formerly considered, in Vallette case.

In considering the Vallette dry dock it is to be noted that the only other structure considered as like the Vallette dry dock was a ferry bridge, which would be a permanent structure in every way attached to land for land purposes solely; a sailor's meeting house which *was kept in place by a paling of surrounding piles;* and a wharf or warehouse projecting into the water which would be undoubtedly a part of the land and was in no sense concerned with sea commerce but was for land purposes. Now in every one of these structures there was undoubtedly in the Judge's mind no idea of a floating structure such as the Jahncke Steel Dock or one which could be or was in a position to or intended to be moved. The sailor's meeting house was permanently attached to the land by being surrounded by a paling of piles. The ferry bridge was fastened to and attached to the land in such a way as never to be moved and was intended for foot or land travel. A wharf or warehouse projecting into the water would be a permanent fixture and intended to be a permanent fixture in every way. There is no permanent fixture about the Jahncke Steel Dry Dock No. 1, as appears from the libel, and there was no intention of it being a permanent fixture.

In his brief (p. 4) the appellee states that the real and only purpose of the dock's capstans could be presumed to be for slacking lines or hauling in ships. Why not for moving itself up and down the wharf, or out in the River? The presumption of appellee is not

correct. It is well answered by the Judge of the District Court in the case of Charles Barnes Company v. One Dredge Boat, 169 Fed. Rep., Page 900. In this case the Judge found that a floating structure was a vessel whether it could be moved by means of poles or ropes attached to its capstans or towed.

Page 900:

> "According to plaintiff's affiants, the sole object of the steam engine and capstans is to propel the structure to such places as it may be desired to move it. This is done by means of an anchor or other thing to tie to. It is conceded by defendant's affiants that it can be propelled in this way, but it is denied that this is what the engines and capstans are for. It is claimed that their purpose is, by connecting with barges desired to be pumped by means of ropes, they can be drawn to it, and that this is the sole use that has been made of them. At first the hand capstan was made use of, and, this not working satisfactorily, the steam engines and capstans were added. It would seem that, if this apparatus can be made use of to draw barges to the pump-boat, it can also be made use of in drawing the pump-boat to the barges."

In his brief, appellee criticizes the allegations of fact regarding the dry dock—that is: where it is said that the dock was "movable and sea-going dry dock"; "with power to move itself by means of a capstan;" "at times fastened to shore solely my ropes or cables and held by anchors in river and for temporary location;" "to be

moored where business requirements might designate its use." He seems to think that the libel should state when and how many times it went to sea; when and how many times it moved itself; how many times it was fastened to shore; when business requirements required it to be used, etc., etc. These qualities and qualifications of this dry dock are all that need be stated in the libel, together with the allegations that the dry dock in this case is a vessel and within the admiralty and maritime jurisdiction. By filing no affidavits or answer and by refusing to allow testimony to be taken, the appellee has agreed to the truth of all these allegations. It does not concern him now, nor the Court, on what dates, when and how many times this dock did or would exercise any of its power as a vessel. From the pleadings in this case I respectfully suggest that the Court must agree with the libel that the dry dock in this case is a vessel.

The decision in the Vallette case did not decide that *any structure called a dry dock* was not within the admiralty jurisdiction. The decision in the Vallette case covered solely the dry dock in that case and such dry docks as might be exactly like the dry dock in the Vallette case. In this case it is alleged that the dry dock with the qualifications stated is a vessel and within the admiralty jurisdiction. There is no denial of the qualifications of the dock or the fact that she is a vessel and within the admiralty jurisdiction. The only question before the Court is: can no structure called a

dry dock be a vessel? Certainly proper structures called "dry docks" can be, because the ruling of the Court in the Vallette case was not a ruling merely as to a name. As undoubtedly a dry dock can be a vessel and as this dry dock is shown to have the characteristics which should bring it within the definition of a vessel and is alleged to be a vessel and this is not contradicted, then certainly there is nothing for the Court to do except to hold that Jahncke Dry Dock No. 1 is a vessel and within the admiralty jurisdiction.

Again, the Revised Statutes of the United States define the word "vessel" as follows: "The word 'vessel' includes every description of water craft or other artificial contrivance used, or *capable of being used*, as a means of transportation on water." The italics are mine. Federal Statutes Annotated Volume 3, Section 3, page 134; Sec. 3, C. 1, Tit. 1 Rev. St. (U. S. Comp. R. St., 1901, p. 4.) Certainly under this definition this steel dry dock is a vessel.

Possibly if in the minds of Mr. Justice Bradley the Vallette dock had not been permanently moored, had not been an ordinary wooden structure, the characteristics of which at the time were known to be of an intended permanent nature and not a structure which could be moved about, and if it had not been like a ferry bridge permanently attached to land for land use only, a wharf or warehouse permanently attached to land and for no other use than land use, or a seaman's bethel permanently attached to land by a paling of surround-

ing piles, Mr. Justice Bradley would have held that it came under this definition of a vessel—that is a structure "capable of being used as a means of transportation on water." From the manner in which this dock comported itself in the great current in the Mississippi River when it broke adrift it can easily and honestly be presumed that it could have carried a vessel within itself up and down the River or could have transported property and persons across the ocean.

We submit that this Court can very well and very properly adopt the definition of vessels which the Congress of the United States has adopted as the definition and hold that the steel dry dock comes within this definition. But, in any event, we believe that the Court can properly hold and we trust that it will hold that the old time dry dock in the Vallette case built in 1866 and moored in place for twenty years about 1887, the time of the decision, was in every way a structure impossible of being moved around to any extent and was intended to and was permanently moored, while the Jahncke Steel Dry Dock No. 1, the modern powerfully-built floating structure with her own engine, with her own capstans, capable of any sea-going trip, capable of floating around everywhere sunk deep in the river as this dock was, is in every way a "vessel" and within the admiralty jurisdiction.

RICHARD B. MONTGOMERY,
Proctor for Appellant.

NYANZA STEAMSHIP COMPANY, LTD. *v.* JAHNCKE DRY DOCK No. 1, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 307. Argued March 6, 1924.—Decided April 7, 1924.

The rule confining the jurisdiction of this Court by appeal to final judgments completely disposing of litigation, applies to jurisdictional appeals, under Jud. Code, § 238, in admiralty cases. P. 440.

Appeal dismissed.

APPEAL from a decree of the District Court dismissing, for want of admiralty jurisdiction, three of four causes of action contained in a single libel.

Mr. Richard B. Montgomery for appellant.

Mr. Walter Carroll, with whom *Mr. Geo. H. Terriberry* was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The owners of the Steamship Nyanza filed, in the Federal Court for Eastern Louisiana, against Jahncke Drydock No. 1 and the owners thereof a single libel setting forth these four causes of action: *in rem* for salvage, *in personam* for salvage, *in rem* for damage from collision, and *in personam* for such damage. The owners appeared as claimants. Excepting to the libel, they prayed that "in so far as the action is either *in rem* or *in personam* for salvage, and *in rem* for damage" it be dismissed for want of admiralty jurisdiction. The court maintained the exception; entered a decree of dismissal precisely as prayed for; and allowed an appeal under § 238 of the Judicial

Code, with a certificate that "in this decree the question of jurisdiction alone is in issue."

The decree leaves the cause of action *in personam* for damage undisposed of. For this reason the appeal must be dismissed for want of jurisdiction in this Court, although the objection was not taken by the appellee. This Court has jurisdiction under § 238, as under others, only of writs of error or appeals from final judgments. And the judgment must be not only in its nature final, but a complete disposition of the cause. *Collins* v. *Miller*, 252 U. S. 364, 370. This rule is applicable to appeals in admiralty. *Bowker* v. *United States*, 186 U. S. 135; *Oneida Navigation Corporation* v. *W. & S. Job & Co., Inc.*, 252 U. S. 521. There is nothing to the contrary in *Withenbury* v. *United States*, 5 Wall. 819, or in *The Pesaro*, 255 U. S. 216, 217. Counsel suggested that the dismissal of this premature appeal might somehow release the dry-dock, to libelant's prejudice. It obviously cannot have that effect.

Dismissed.